SUPREME COURT, U. S.

No. 581

Supreme Court, U.S.
FILED
SEP 28 1970
E. ROBERT SEAVER, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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JOHN M. LOTTERELL, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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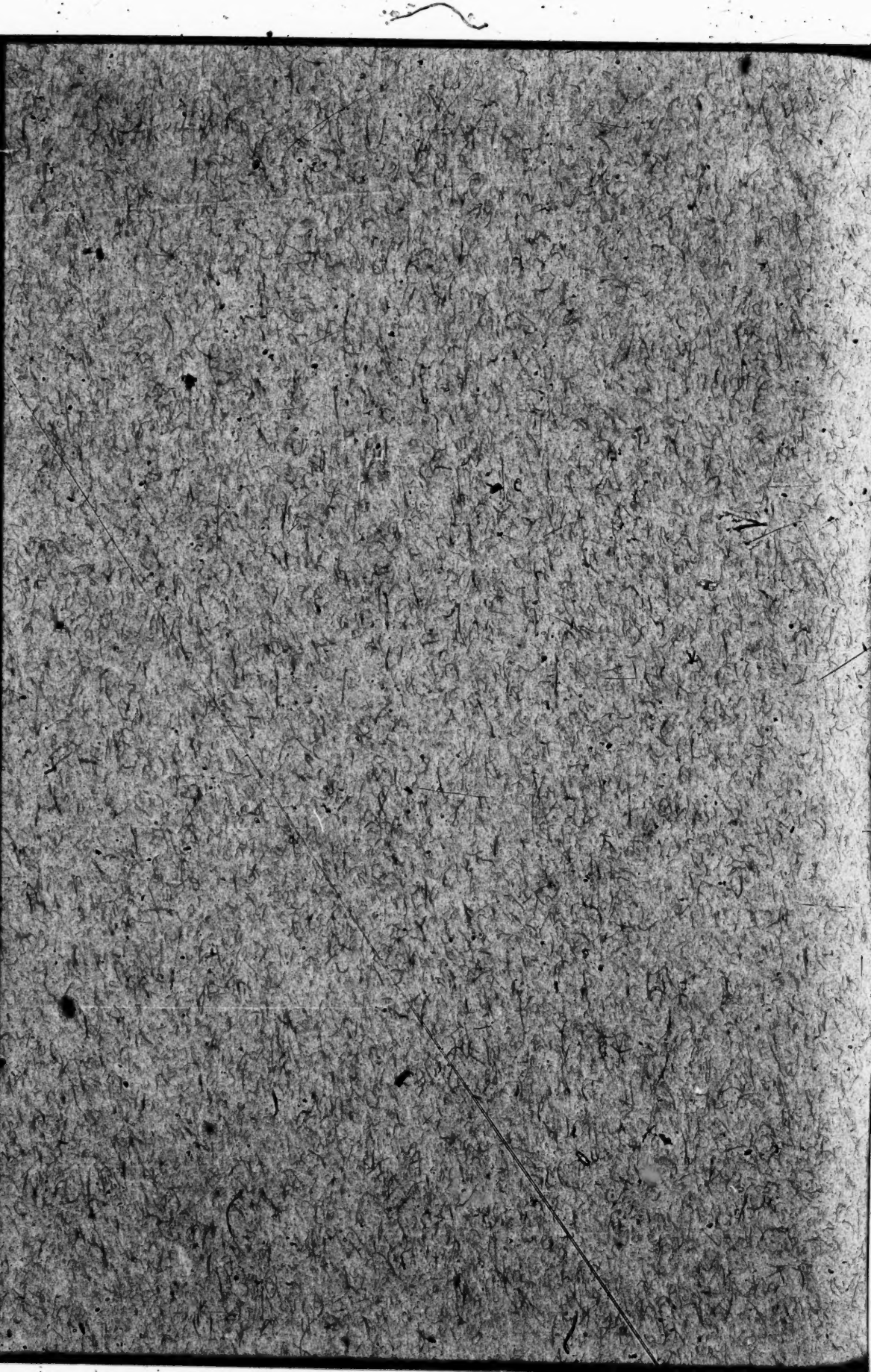
ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*



# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 587

JOHN M. LUTTRELL, PETITIONER

v.

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We invite the Court's attention to the following facts which demonstrate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on February 17, 1970. A petition for rehearing was filed on May 4, 1970,* and denied on May 21, 1970. The petition

* The petition for rehearing apparently also was untimely filed. On March 6, 1970, 17 days after the entry of judgment, petitioner obtained an extension of time to April 10, 1970.

for a writ of certiorari was filed on August 24, 1970, 95 days after the denial of that petition for rehearing, and no extension of time for petitioning was obtained.

Since the petition was not filed within the 90-day time limit of 28 U.S.C. 2101(c), and since that limit is jurisdictional, the petition for a writ of certiorari should be denied as untimely.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

SEPTEMBER 1970.

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within which to file a petition for rehearing. This time was further extended by the court of appeals to May 1, 1970. However, the petition for rehearing was not filed until May 4, 1970, three days after the last extension of time had expired.

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SUPREME COURT, U. S.

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# In the Supreme Court
## of the United States

OCTOBER TERM, 1970

**No. 587**

JOHN M. LUTTRELL,

*Petitioner,*

v.

THE UNITED STATES OF AMERICA

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**Petitioner's Reply Memorandum to the Memorandum of The United States in Opposition**

ADELBERT G. CLOSTERMANN
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Portland, Oregon 97205
*Attorney for Petitioner*

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-70

# In the Supreme Court

## of the United States

OCTOBER TERM, 1970

**No. 587**

JOHN M. LUTTRELL,

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**Petitioner's Reply Memorandum to the Memorandum of The United States in Opposition**

That this Court does have jurisdiction is evidenced by the facts and the record.

The time limitation of August 22, 1970 (Saturday) for the filing of the Petition for Writ of Certiorari was concurrent with and coincided with the July 17th, 1970 Order Staying Issuance of the Mandate set by The Honorable Richard Chambers, Chief Judge, United States Circuit Court of Appeals, Ninth Circuit, herein reproduced at end of this memorandum.

The petition was mailed on August 21, 1970 in Portland, Oregon as evidenced by the certificate of service by mail on the original thereof, properly addressed with prepaid airmail postage to the Clerk, Supreme Court of The United States, with copies thereof in accordance with rules properly addressed to the Solicitor General of the United States, Washington, D.C., in sufficient time to be received in due course of mail in Washington, D.C., on August 22, 1970.

Respondent's foot note references to untimely* fil-

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The February 17th, 1970 opinion of the Ninth Circuit was received in the office of counsel while he was attending military meetings in Washington, D. C., returning on March 3, 1970. Counsel is in individual general practice attorney and on return began preparation of a Motion for Rehearing. Because of the absence from the office a timely motion was made to the Court and granted, extending time for filing thereof until April 1, 1970. During this time period counsel was informed of the recent suicide of respondent's primary witness (see pp. 28, 29, 30 of Petition) Coast Guard Commander Ronneberg. Shortly thereafter, his mis-statements of fact on which the fact-trier substantially relied exonerating the shipowner in this Admiralty case were revealed in an exhaustive investigation, documented and confirmed (see Petition pp. 28, 29, 30).

Thereupon, and by reasons of the disclosures, and the serious challenge to the credibility of said witness, counsel enlisted the assistance and counselling of a colleague in the preparation of the Motion for Rehearing due April 1, 1970.

While this motion was being researched and drafted, counsel's assisting colleague was the victim of a coronary attack disabling him. Based on the disability of the colleague, an extension of time was granted by the Court to allow for his convalescence and subsequent assistance and counselling. That Motion was timely filed as evidenced by the affidavit of service and filing by mail on respondent's counsel dated May 1, 1970 and certificate of the Clerk, Court of Appeals on the record. Counsel has never been in default, nor were filings untimely made and judgment has never been entered. Judge Chambers' order herein attests to the time requirement of the petition in this Court.

ings by petitioner in the Circuit Court of Appeals do not coincide with the attesting certificate of the Clerk of the said Court in the transmittal of the Record to the Clerk of the Supreme Court as to verity of the Record and hence must be rejected as not being factually supported.

All filings made in the Circuit Court of Appeals were timely and were made in accordance with Appellate Rule 25 (c) providing for service on opposing counsel and filing by mail. This is substantiated by certificate of service and filing thereof by mail on all original documents made by counsel.

That counsel has never been in default is evidenced by the record and this is supported by the record of Court of Appeals, Ninth Circuit.

Based on the foregoing timely filing herein by mail and in compliance with the Order of Judge Chambers, and in the interests of justice to an Admiralty ward of this Court, respondent's motion by way of their Memorandum should be denied.

Respectfully submitted,

ADELBERT G. CLOSTERMANN,
Counsel for Petitioner,
639 Park-Haviland Hotel,
Portland, Oregon 97205

# United States Court of Appeals

FOR THE NINTH CIRCUIT

FILED

JUL 22 1970

WM. B. LUCK, CLERK

JOHN M. LUTTRELL,
Plaintiff-Appellant

-vs-

UNITED STATES OF AMERICA,
Defendant-Appellee

No. 23645

## ORDER STAYING ISSUANCE OF MANDATE

Upon application of ADELBERT G. CLOSTERMANN counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before AUGUST 22, 1970

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Richard H. Chambers

United States Circuit Judge.

DATED: SAN FRANCISCO, CALIF.
JULY 17, 1970

FORM NO. 14